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No. 09-34

IN THE

Supreme Court of the United States

PFIZER, INC.,

Petitioner,

v.

RABI ABDULLAHI, *et al.*,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Counsel for Petitioner signed a letter consenting to the filing of this brief. Counsel for the *Abdullahi* Respondents indicated in an email that his clients consented to the filing. Counsel for the *Adamu* Respondents did not respond to requests for consent. Accordingly, this motion for leave to file is necessary.

WLF is a public interest law and policy center headquartered in Washington, DC, with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has devoted substantial resources over the years to opposing litigation designed to create private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, because such litigation generally seeks (inappropriately, in WLF's view) to incorporate large swaths of allegedly customary international law into the domestic law of the United States. *See, e.g., Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004); *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009). WLF also filed a brief in this matter when it was before the appeals court.

AEF is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in

diverse areas of study, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici agree with the Court's view, expressed in *Sosa*, that a decision to create a private right of action is one better left to legislative judgment. Congress has given no indication that it has authorized recognition of the open-ended federal common law medical malpractice tort recognized by the Second Circuit in this case. In the absence of any such indication, *amici* believe it is inappropriate for the courts to create such a cause of action on their own.

Amici are also concerned that an overly expansive interpretation of the ATS threatens to undermine American foreign and domestic policy interests. By exercising ATS jurisdiction over events taking place in foreign countries whose courts often have a much greater stake in those events than do American courts, the federal appeals are risking the creation of considerable conflict between the United States and those foreign countries – and they are doing so in the absence of any clear indication from Congress that it approves of such litigation.

Amici have no direct interest, financial or otherwise, in the outcome of this case. They seek to file their brief due solely to an interest in maintaining appropriate limits on federal court jurisdiction. *Amici* address the second Question Presented only: what is the appropriate level at which to place *Sosa*'s "high bar to new private causes of action" under the ATS?

For the foregoing reasons, *amici* WLF and AEF respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Amici address only the second issue raised by the petition:

Whether, absent state action, a complaint that a private actor has conducted a clinical trial of a medication without adequately informed consent can surmount the "high bar to new private causes of action" under the ATS that this Court recognized in *Sosa v. Alvarez-Machain*, 542 U.S. 682, 727 (2004).

That issue necessarily encompasses an examination of just how high the bar should be set in ATS cases. In particular, should the bar be set low enough to permit such ATS actions to proceed when the events at issue took place in a foreign country and the private actor is a corporation?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation and Allied Educational Foundation are more fully set forth in the accompanying motion to file this brief.[1]

Amici are concerned that an overly expansive interpretation of the ATS threatens to undermine American foreign and domestic policy interests. The Court expressed similar concerns in *Sosa* in 2004. Several federal appellate courts, including the court below, appear not to have heeded that expression of concern and instead have continued apace with the recognition of an ever-expanding federal common law of actionable violations under "the law of nations."

STATEMENT OF THE CASE

This case arises from claims by citizens of Nigeria that they were injured as a result of allegedly deficient medical care. Respondents (or their relatives) were treated by a team of doctors sent by Petitioner Pfizer Inc. to Nigeria in response to a severe outbreak of meningitis. They allege that Pfizer failed to inform

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file.

them that they were to be treated with Trovan, which Respondents describe as a "new, untested, and unproven" antibiotic, and that they would not have consented to treatment had they been aware of Trovan's unapproved status. They further allege that Pfizer's sole purpose in providing medical assistance was to collect data that would speed Food and Drug Administration (FDA) approval of Trovan for pediatric uses.

One group of Respondents (the "*Abdullahi* Respondents") filed suit in federal district court in New York, alleging a cause of action against Pfizer under the ATS, 28 U.S.C. § 1350. They allege that Pfizer's conduct is actionable as a violation of customary international law. A second group of Respondents (the "*Adamu* Respondents") filed suit in federal court in Connecticut; that suit was later transferred to New York as a related case to the one filed by the *Abdullahi* Respondents.

The district court dismissed the complaint of the *Abdullahi* Respondents in August 2005 for failure to state a claim under the ATS. Pet. App. 114a-152a. The court held that to state a claim under the ATS, a plaintiff must allege violation of a "clear and unambiguous" rule of customary international law. *Id.* at 135a (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980)). The court held that none of the documents cited by Respondents – including the Nuremberg Code, the Declaration of Helsinki, guidelines authored by the CIOMS, article 7 of the International Covenant on Civil and Political Rights ("ICCPR"), and the Universal Declaration of Human Rights – provided

the requisite "clear and unambiguous" rule. *Id.* at 135a-142a. The court said, "A cause of action for Pfizer's 'failure to get any consent, informed or otherwise, before performing medical experiments on the subject children' would expand customary international law far beyond that contemplated by the ATS." *Id.* at 141a. In November 2005, the district court dismissed the complaint of the *Adamu* Respondents on substantially similar grounds. *Id.* at 153a-174a.

A divided Second Circuit panel reversed with respect to both sets of Respondents. Pet. App. 1a-106a. The majority recognized that when this Court held in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), that Congress (in adopting the ATS) had authorized federal courts to create a "relatively modest set" of federal common law causes of action for violations of the law of nations, it "set 'a high bar to new private causes of action'" beyond those contemplated in 1789. *Id.* at 17a-18a. The majority nonetheless held that Respondents' complaints met that high bar, finding that Pfizer's alleged actions in Nigeria violated a norm: (1) of international character that States uniformly abide by, or accede to, out of a sense of legal obligation; (2) that is defined with a specificity comparable to the 18th-century paradigms discussed in *Sosa*; and (3) that is of mutual concern to States. *Id.* at 20a-50a. It thus reversed the dismissal of the ATS claims. The majority also remanded the cases for reconsideration of *forum non conveniens* issues and, with respect to the *Adamu* Respondents, for reconsideration of a choice-of-law issue affecting their separate claims under Connecticut law. *Id.* at 52a-58a.

Judge Wesley dissented and would have upheld the district court's dismissal. *Id.* at 58a-106a. While agreeing with the majority's methodology used "to determine whether a norm falls within the jurisdictional grant of the ATS," he disagreed with the majority's conclusion "that a norm against non-consensual medical experimentation on humans by private actors is (1) universal and obligatory or (2) a matter of mutual concern." *Id.* at 60a. He acknowledged that "many countries have prohibited private actors from conducting medical experiments or treatments without informed consent." *Id.* at 73a. Judge Wesley nonetheless asserted that such prohibitions are irrelevant for purposes of customary international law, because it is only when states prohibit domestic action as a result of "express international accords" (which he asserted did not exist here) that a wrong becomes a violation of customary international law. *Id.* at 73a-74a.

Judge Wesley added:

> "[S]ubstantive uniformity" among states' domestic laws is only a starting point for demonstrating international custom through individual state practice, which should also reflect a "procedural" consensus among states on how that behavior should be prosecuted – both criminally and civilly. *See Sosa*, 542 U.S. at 761-62 (Breyer, J., concurring).

Id. at 74a. Judge Wesley asserted that there was no "procedural" consensus that would allow tort actions under international law for non-consensual medical treatment. *Id.*

REASONS FOR GRANTING THE PETITION

This petition raises issues of exceptional importance. The Court in *Sosa* made clear that courts should exercise great caution in recognizing new federal common law rights of action under the ATS. Indeed, it indicated that there might not be *any* additional causes of action beyond the three common law rights of action generally recognized at the time Congress adopted the ATS in 1789.

But far from heeding *Sosa*'s words of caution, the Second Circuit and several other federal appellate courts have viewed *Sosa* as a license to continue with business as usual and to create an ever-expanding array of federal common law causes of action for alleged violations of the law of nations. The failure-to-obtain-informed-consent cause of action recognized by the panel in this case carries that trend to new heights.

Last year, the Court was presented with an excellent vehicle for answering several basic issues regarding the scope of ATS liability, when numerous corporations sought review of a Second Circuit decision that allowed an ATS suit to go forward based on claims that the corporations had aided and abetted human rights violations by doing business in South Africa while the apartheid government was still in power. Unfortunately, four Justices were unable to participate in that case, and the lack of a quorum prevented the Court from granting review. *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom., American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

Two of those basic issues are once again raised by this petition, thereby rendering it a particularly suitable vehicle for addressing ATS claims. First, the Second Circuit panel determined that the ATS could be applied to conduct that took place in a foreign country, just as it had in *Khulumani* and in a series of earlier ATS decisions. *Sosa* did not address the extraterritorial reach of the ATS, but *amici* note that the United States has repeatedly taken the position that the ATS does not apply to alleged violations of the law of nations that take place within foreign countries, and a number of the briefs filed with the Court in *American Isuzu* explicitly raised the issue. Review is warranted to determine whether, in light of the presumption that federal statutes do not apply extraterritorially, the Second Circuit erred in recognizing an ATS cause of action based on actions allegedly taken by Pfizer in Nigeria. The extraterritoriality issue is fairly encompassed within Issue 2 of the Petition.

Second, the Second Circuit panel recognized an ATS cause of action against a corporate defendant. *Sosa* raised the issue (without deciding) whether private corporations could be proper defendants in an ATS action. *Sosa*, 542 U.S. at 732 n.20. *Amici* nonetheless note that there is a significant body of evidence suggesting that the law of nations does not recognize actions for damages against corporations. Indeed, the issue was explicitly raised by those seeking review from *Khulumani*, and the dissenting Second Circuit judge in *Khulumani* would have affirmed dismissal of the apartheid litigation on the ground that corporations are not proper ATS defendants. *Khulumani*, 504 F.3d at 321-26. Review is warranted to determine whether the

Second Circuit erred in recognizing an ATS cause of action in this case given that the sole defendant (Pfizer) is a corporation. The corporate defendant issue if fairly encompassed within Issue 2 of the Petition; the issue goes to the question of where *Sosa*'s "high bar to new private causes of action" should be placed.

I. REVIEW IS WARRANTED TO DETERMINE WHETHER THE ATS APPLIES EXTRATERRITORIALLY

In light of *Sosa*'s admonition that federal courts exercise "great caution" in recognizing *any* federal common law rights actionable under the ATS (in addition to the three common law rights of action generally recognized at the time of the ATS's adoption in 1789), it is incumbent on courts to take a careful look at the broad scope of the causes of action that plaintiffs in this and many other ATS cases are asking the courts to recognize. Plaintiffs with few or no contacts with the United States routinely ask lower federal courts to resolve human rights disputes centered in a foreign country, and an increasing number of lower federal courts have determined that the ATS authorizes the courts to do so. This Court has never addressed the issue of whether Congress intended the ATS to apply extraterritorially. *Amici* respectfully submit that in light of the presumption *against* extraterritorial application of U.S. laws, the lower federal courts are in need of guidance from this Court regarding whether Congress, when it adopted the ATS in 1789, really intended to authorize federal courts to create federal common law rights based on actions taken within a foreign country.

There is serious reason to doubt that Congress harbored such an intent. Since the early years of the Republic, there has been a strong presumption "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).[2] As the Court recently explained, "Foreign conduct is generally the domain of foreign law," and "courts should 'assume that legislators take account of the legitimate sovereign interests of other nations when they write American law.'" *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007) (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004)). In the absence of any evidence that Congress intended that federal common law causes of action recognized pursuant to ATS jurisdiction should extend to activities within foreign nations, the presumption against extraterritorial application of the ATS should hold sway.

Sosa itself expressed grave doubt that any such

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[2] The Supreme Court "assume[s] that Congress legislates against the backdrop of the presumption against extraterritoriality." *Id.* Thus, "unless there is the affirmative intention of the Congress clearly expressed" in "the language [of] the relevant Act," the Court presumes that a statute does not apply to actions arising abroad. *Id.* The presumption against extraterritoriality was well-established at the time the ATS was adopted. *See The Apollon*, 22 U.S. (9 Wheat) 362, 370 (1824). The 1795 opinion of Attorney General Bradford, to which the Court referred in *Sosa*, stated that insofar as "the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States." 1 Op. Att'y Gen. 57, 58 (1795).

causes of action should be recognized and indicated that federal courts should exercise extreme caution before doing so. Those doubts were based in large part on "the potential implications for the foreign relations of the United States of recognizing such causes." *Sosa*, 542 U.S. at 727. The Court explained:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agents has transgressed those limits. . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, *if at all*, with great caution.

Id. at 727-28 (emphasis added). As the Petition explains (at 27-28), one can readily foresee the adverse foreign policy consequences that could arise from lawsuits of this sort.

Amici acknowledge that several federal appeals courts have recognized federal common law rights of action under the ATS based on conduct occurring in foreign countries, and we are aware of no federal appellate decisions that have barred such rights of action. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). But none of those decisions – even those decided after *Sosa*

– directly addressed the extraterritoriality issue. They simply assumed without deciding that any ATS-based cause of action should be recognized without regard to where the underlying events took place. The federal appeals courts have thus far declined to address the issue despite a series of post-*Sosa amicus curiae* briefs filed by the United States, in which the government argued that causes of action recognized under the ATS should be limited to events taking place in the United States or on the high seas. *See, e.g., Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Brief of United States as *Amicus Curiae*).

Furthermore, the history leading up to adoption of the ATS in 1789 strongly suggests that Congress did not intend the ATS to apply extraterritorially. As *Sosa* recognized, the ATS was adopted in response to a decade-long concern that America's standing within the international community would suffer if it failed to uphold international law by failing to permit aliens a means of seeking redress in American courts for injuries inflicted on them by virtue of violations of the law of nations. *Sosa*, 542 U.S. at 715-19. Those concerns focused on injuries suffered by aliens while living in the United States. *Id.* Nothing in the pre-1789 history provides any support for the proposition that the ATS was intended to apply extraterritorially.

As *Sosa* explained, late 18th-century legal scholars recognized only three offenses by individuals that violated the law of nations: piracy, offenses against ambassadors, and violations of safe conducts. *Sosa*, 542 U.S. at 715 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 68 (1769)). It was those

offenses that Congress apparently had in mind when it adopted the ATS. *Id.* at 719. Most importantly, Congress apparently was mindful of the need to create an adequate judicial forum when those offenses were committed *within the United States*. *Id.*[3]

Concern about creating an adequate forum for addressing violations of the law of nations arose during the American Revolution, "owing to the distribution of political power from independence through the period of confederation." *Id.* at 716. As the Court explained:

> The Continental Congress was hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished." J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed. 1893), and in 1781 the Congress implored the States to vindicate rights under the law of nations. In words that echo Blackstone, the congressional resolution called upon state legislatures to "provide expeditious, exemplary, and adequate punishment" for "the violation of safe conducts or passports, . . . of hostility against such as are in amity, . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of

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[3] The same Congress that enacted the ATS enacted a statute criminalizing the three offenses – piracy, assaults on ambassadors, and violations of safe conducts – that gave rise to the ATS. 1 Stat. 112, §§ 8, 25 (April 30, 1790). Like the ATS, the criminal statute was silent regarding whether it was to have extraterritorial application. However, although invoked by prosecutors many times, the statute was never invoked in cases involving actions taken within the territory of another nation.

> treaties to which the United States are a party." 21 *Journals of the Continental Congress* 1136-37 (G. Hunt ed. 1912). The resolution recommended that the States "authorize suits . . . for damages by the party injured, and for compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen." *Id.*, at 1137.

Sosa, 542 U.S. at 716. Quite plainly, the concern focused on misconduct committed by American citizens and others living within this country. The United States could only be said to have "sustained" damages by virtue of "an injury to a foreign power" if the injury occurred domestically; only then could the Nation's international esteem be thought to have suffered by virtue of having failed to prevent the injury to the alien/foreign power from occurring.

A. Offenses Against Ambassadors

Two events in the 1780s – involving assaults on foreign government officials within the United States – heightened the "appreciation of the Continental Congress's incapacity to deal with" violations of the law of nations. *Id.* The first event, the Marbois Affair of May 1784, was widely recognized as a sign of the weakness of the national government. A "French adventurer, Longchamps, verbally and physically assaulted the Secretary of the French Legion," Mr. Marbois, in Philadelphia. *Id.* "The international community was outraged and demanded that the Congress take action, but the Congress was powerless to deal with the matter. It could do nothing but offer a

reward for the apprehension of de Longchamps so that he could be delivered to the state authorities." William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491-92 (1986). The Marbois Affair "was a national sensation that attracted the concern of virtually every public figure in America. The Continental Congress's impotence when confronted with violations of the law of nations had been clearly established." *Id.* at 492-93. It was discussed on numerous occasions at the Constitutional Convention in 1787 and led to inclusion of Art. I, § 8, cl. 10 (granting Congress the power to "define and punish . . . Offences against the Law of Nations") and Art. III, § 2 (granting federal courts jurisdiction over "Cases affecting Ambassadors [and] other public Ministers and Consuls").

A similarly notorious incident occurred in 1787 during the ratification process following the convention. A local New York City constable entered the house of the Dutch ambassador and arrested one of his servants. This "affront" to diplomatic immunity "outraged" the ambassador, who protested to national government officials; but "[a]s in the Marbois Affair, the national government was powerless to act." Casto, at 494. The only sanction came at the hands of state courts in New York, which deemed the constable's conduct a violation of the law of nations, actionable under New York's common law. *Id.* at 494 n.153. Thus, when Congress adopted the ATS in 1789 in order to create federal court jurisdiction over the three torts thought actionable as violations of the law of nations, the two best-known examples of torts made actionable thereby (Marbois and

the Dutch ambassador) both involved conduct that had taken place within the United States.

B. Violations of Safe Conducts

There is also no evidence that Congress contemplated extraterritorial application of the second tort covered by the ATS, violations of safe conducts. As explained by the Sixth Circuit, a "safe conduct" is defined as "[a] privilege granted by a belligerent allowing an enemy, a neutral, or some other person to travel within or through a designated area for a specific purpose. . . . Blackstone makes it clear that a violation of safe conducts occurs when an alien's privilege to pass safely through the host nation is infringed and the alien consequently suffers injury to their 'person or property.' 4 Blackstone, *Commentaries on the Law of England*, at 68-69." *Taveras v. Taveraz*, 477 F.3d 767, 773 (6th Cir. 2007). No 18th century legal commentator suggested that nations should be concerned about protecting the rights of aliens who were traveling through *other* nations. Rather, it was understood that a nation should be concerned with protecting the rights of aliens who had been granted a safe conduct while traveling through *that nation*.[4]

Blackstone explained that violations of safe conducts "are breaches of the public faith, without the preservation of which there can be no intercourse between one nation and another." Blackstone, at 68-69.

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[4] Also understood to be protected were aliens passing through overseas territories, in those areas in which the nation "had a military presence." *Taveras*, 477 F.3d at 773.

If a nation was to avoid war with the nation whose citizen's travel was interrupted, it was required to punish the individual responsible for the interruption. *Id.* Accordingly, new nations like the United States, in order to preserve peace, had a particular interest in ensuring that redress was provided to those foreigners whose safe conducts were violated while traveling in the United States. Conversely, such nations would have had little interest in providing a judicial forum to, for example, a Spaniard who claimed that his safe conduct (akin to a modern-day visa or passport) had been violated while he traveled through England. Interpreting the ATS to provide jurisdiction in federal court over such a cause of action would likely lead to conflict with England, the precise opposite from the intended purpose of providing redress for violations of safe conducts.

C. Piracy

The third tort covered by the ATS in 1789, piracy, quite clearly encompassed conduct that occurred outside the territorial jurisdiction of the United States. But while the federal courts exercised jurisdiction over piracy on the high seas, that jurisdiction did *not* include acts of piracy occurring within the jurisdiction of foreign nations.

Indeed, piracy was viewed in the 18th century as a unique offense precisely because it so often occurred outside the sovereign territory of *any* nation. Unless nations were willing to exercise jurisdiction over acts of piracy occurring outside their territory, then many such acts would go unpunished. Thus, by general agreement

of legal commentators, *all* nations were both entitled and obligated to punish piracy on the high seas. *See, e.g. United States v. Smith,* 18 U.S. (5 Wheat.) 153, 163 n.8 (1820) ("'[A]s pirates are the enemies of the human race, piracy is justly regarded as a crime against the universal laws of society, and is everywhere punished with death. . . . [E]very nation has a right to pursue, and exterminate them, without a declaration of war.'") (quoting Azuni, part 2, c. 5, art. 3, Mr. Johnson's translation); *United States v. Klintock,* 18 U.S. (5 Wheat.) 144, 152 (1820) (those engaging in robbery/plunder on the high seas "are proper objects for the penal codes of all nations," unless they are acting "under the acknowledged authority of a foreign State.").

Importantly, not only was the 1790 piracy statute never invoked to cover alleged acts of piracy within the territory of a foreign nation, the Supreme Court interpreted that statute as not even applying to robberies committed by ships on the high seas sailing under the authority of a foreign nation. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-34 (1818). It is difficult to believe that the same Congress that adopted an anti-piracy statute of such limited scope nonetheless adopted an ATS statute for the purpose of extending the federal common law so as to regulate conduct within foreign nations.

In sum, neither the text nor legislative history of the ATS suggests that Congress intended the ATS to apply to conduct occurring within foreign nations. Under those circumstances, the presumption against the extraterritorial application of U.S. law suggests that the ATS does not apply to the events at issue here, which

occurred in Nigeria. Review is warranted to determine whether "the high bar to new private action" under the ATS, *Sosa*, 542 U.S. at 727, precludes extraterritorial application of the ATS.

III. REVIEW IS WARRANTED TO DETERMINE WHETHER THE ATS APPLIES TO CORPORATIONS

As Judge Wesley noted in dissent, the panel's conclusion that there exists "substantive uniformity" among states' domestic laws is "only a starting point" for determining whether an alleged norm of international law should be actionable under the ATS. Pet. App. 74a. There must also be "a 'procedural' consensus among states on how that behavior should be prosecuted – criminally and civilly." *Id.* (citing *Sosa*, 542 U.S. at 761-62 (Breyer, J., concurring)). One such procedural issue identified by *Sosa* is whether there is an international consensus that private corporations are appropriate subjects for criminal and civil enforcement of international law norms. Review is warranted in light of the substantial evidence that no such consensus exists.

In his dissent from the Second Circuit's apartheid decision, Judge Korman set out at length the case against holding corporations liable under the ATS. *Khulumani*, 504 F.3d at 321-26 (Korman, J., dissenting). As Judge Korman explained:

> There is a significant basis for distinguishing between personal and corporate liability. Where the private actor is an individual, he is held liable

> for acts which he has committed and for which he bears moral responsibility. On the other hand, "legal entities, as legal abstractions can neither think nor act as human beings, and what is legally ascribed to them is the resulting harm produced by individual conduct performed in the name or for the benefit of those participating in them or sharing in their benefits." M. Charif Bassiouni, *Crimes Against Humanity in International Criminal Law* 378 (2d ed. 1999). Thus, the issue here is whether an artificial entity that is allegedly used as a vehicle for the commission of a crime against humanity may be held vicariously liable.

Id. at 321. Judge Korman concluded that federal common law rights of action should not be recognized against corporations under the ATS because "[t]he sources evidencing the relevant norms of international law at issue plainly do not recognize such liability." *Id.*

In support of its contention that the law of nations prohibits non-consensual medical treatment, the court below relied to a significant degree on the war crimes trials at Nuremberg following World War II. Pet. App. 26a-31a. There is serious question whether the history of the Nuremberg prosecutions provides any support whatsoever for Respondents' allegations regarding the medical treatment provided by Pfizer in Nigeria in 1996.[5] But one highly relevant fact regarding

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[5] *Amici* are disturbed by the cavalier comparisons being made between Pfizer's conduct and that of Nazi doctors tried at Nuremberg. Pfizer is accused of failing to obtain informed consent

the Nuremberg trials was not mentioned by the court below: the charter authorizing those trials empowered the tribunal to try "persons." *See Khulumani*, 504 F.3d at 321-22 (Korman, J., dissenting). No corporations were charged with crimes at Nuremberg, even though individual corporate officers were charged with "acting through the instrumentality" of their corporations in committing various crimes against humanity. *Id.*

Nor was the failure to seek sanctions against corporations for violations of international law unique to Nuremberg. In each of the recently adopted statutes and treaties establishing international tribunals to pursue criminal prosecution of those guilty of violating international human rights, jurisdiction was limited to prosecution of individuals. *Id.* at 323 (citing statutes for the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; the Apartheid Convention; and the Genocide Convention).

Indeed, the treaty drafters for the newly created International Criminal Court expressly rejected, following lengthy debate, attempts to include corporate liability for international human rights law violations within its jurisdiction. *See, e.g.*, Andrew Clapham, *The*

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before providing treatment to patients admittedly suffering from life-threatening diseases and thus in need of treatment, in a country in desperately short supply of doctors and medicine. To compare those allegations to Nazi atrocities grossly trivializes the latter, which involved non-therapeutic medical experiments performed on prisoners held at concentration camps.

Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court, in Liability of Multinational Corporations Under International Law 139, 141-58 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000). As a result, the Rome Statute (which creates the International Criminal Court) provides for jurisdiction over only "natural persons." The Rome Statute of the ICC art. 25(1), *opened for signature* July 17, 1998, 37 I.L.M. 999, 1016 (entered into force July 1, 2002).

In light of the consistent rejection of corporate criminal liability for violations of customary international law, it is highly doubtful that corporate liability should be deemed to have the widespread acceptance within the international community demanded by *Sosa* before a federal common law right of action can be deemed to exist.

Nor is there evidence to suggest that international law differentiates between imposition of civil and criminal penalties on corporations. *Amici* are unaware of *any* decision from a court outside the United States holding a corporation either civilly or criminally liable for violations of international law.[6] If there were such a decision, one could reasonably expect that proponents of corporate ATS liability for human rights

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[6] A country may choose of course, to adopt a statute or treaty prohibiting certain types of conduct by corporations and thereby to expose corporations to potential liability. But imposition of liability under domestic statutes cannot be said to constitute imposition of liability under international law – the relevant inquiry in an ATS case.

violations would have cited it. The failure of those proponents to cite such a case, in the face of repeated claims by opponents that no such case exists, is strong evidence that there is no international consensus that corporations may be held liable under international law for alleged human rights violations.

Finally, *amici* note that *Sosa* cautioned that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa*, 542 U.S. at 727. Judicial caution is particularly appropriate with respect to the creation of federal common law causes of action against corporations pursuant to the ATS, because Congress expressly rejected corporate liability when it enacted a closely analogous statute. The Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 *note*, creates a cause of action (for the benefit of aliens and citizens alike) for claims of torture and extrajudicial killing under color of foreign law. The TVPA excludes corporate liability by limiting liability to "[a]n individual who . . . subjects an individual to torture." Congress's decision to bar claims against corporations under the TVPA is a strong indication that it has not authorized the courts to act on their own to create federal common law causes of action against corporations for violations of international human rights law.

As the Petition well documents, American corporations doing business overseas have become the principal targets of ATS lawsuits in recent years. In light of the increasing frequency of such suits and the considerable evidence that there is no international consensus that corporations are subject to either

criminal or civil penalties for violations of customary international law, review is warranted to determine whether *Sosa*'s "high bar to new private causes of action" permits the recognition of corporate liability under the ATS.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

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